

United States District Court
Eastern District of California

Dennis Martel,

Plaintiff,

vs.

No. Civ. S 04-0014 DFL PAN P

Order

California Department
of Corrections, et al.,

Defendants.

-oOo-

Plaintiff is a state prisoner without counsel prosecuting a civil rights action. He seeks leave to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff's declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2).

Pursuant to 28 U.S.C. § 1915(b)(1), plaintiff must pay the \$150 filing fee required by 28 U.S.C. § 1914(a) (2000).

Plaintiff must make monthly payments of 20 percent of the

1 preceding month's income credited to his trust fund account. 28
2 U.S.C. § 1915(b)(2). The agency having custody of plaintiff
3 shall forward payments from plaintiff's account to the clerk of
4 the court each time the amount in the account exceeds \$10 until
5 the filing fee is paid.

6 I have reviewed plaintiff's complaint pursuant to 28 U.S.C.
7 § 1915A and find it states a cognizable claim against defendants
8 R. L. Andreasen, Tom Donahue, John J. Dan, and J. W. Moore.

9 The complaint states no cognizable claim against defendants
10 Cal A. Terhune, Tom Carey or the California Department of
11 Corrections. Plaintiff's claims against these defendants are
12 dismissed.

13 Plaintiff may proceed forthwith to serve defendants R. L.
14 Andreasen, Tom Donahue, John J. Dan, and J. W. Moore and pursue
15 his claims against only those defendants or he may delay serving
16 any defendant and attempt to state a cognizable claim against
17 defendants Cal A. Terhune, Tom Carey and the California
18 Department of Corrections.

19 If plaintiff elects to attempt to amend his complaint to
20 state a cognizable claim against defendants Cal A. Terhune, Tom
21 Carey and the California Department of Corrections, he has 45
22 days so to do. He is not obligated to amend his complaint and if
23 he does it unavoidably will delay this litigation.

24 If plaintiff elects to proceed forthwith against defendants
25 R. L. Andreasen, Tom Donahue, John J. Dan, and J. W. Moore,
26 against whom he has stated a cognizable claim for relief, then

1 within 15 days he must return materials for service of process
2 enclosed herewith. In this event the court will construe
3 plaintiff's election as consent to dismissal of all claims
4 against defendants Cal A. Terhune, Tom Carey and the California
5 Department of Corrections without prejudice.

6 Any amended complaint must show the federal court has
7 jurisdiction, the action is brought in the right place and
8 plaintiff is entitled to relief if plaintiff's allegations are
9 true. It must contain a request for particular relief.
10 Plaintiff must identify as a defendant only persons who
11 personally participated in a substantial way in depriving
12 plaintiff of a federal constitutional right. Johnson v. Duffy,
13 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to
14 the deprivation of a constitutional right if he does an act,
15 participates in another's act or omits to perform an act he is
16 legally required to do that causes the alleged deprivation). If
17 plaintiff contends he was the victim of a conspiracy, he must
18 identify the participants and allege their agreement to deprive
19 him of a specific federal constitutional right.

20 In an amended complaint, the allegations must be set forth
21 in numbered paragraphs. Fed. R. Civ. P. 10(b). Plaintiff may
22 join multiple claims if they are all against a single defendant.
23 Fed. R. Civ. P. 18(a). If plaintiff has more than one claim
24 based upon separate transactions or occurrences, the claims must
25 be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

26 The federal rules contemplate brevity. See Galbraith v.

1 County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002)
2 (noting that "nearly all of the circuits have now disapproved any
3 heightened pleading standard in cases other than those governed
4 by Rule 9(b)"); Fed. R. Civ. P. 84; cf. Rule 9(b) (setting forth
5 rare exceptions to simplified pleading).

6 Plaintiff's claims must be set forth in short and plain
7 terms, simply, concisely and directly. See Swierkiewicz v.
8 Sorema N.A., 534 U.S. 506, 514 (2002) ("Rule 8(a) is the starting
9 point of a simplified pleading system, which was adopted to focus
10 litigation on the merits of a claim."); Fed. R. Civ. P. 8.

11 Plaintiff must eliminate from plaintiff's pleading all
12 preambles, introductions, argument, speeches, explanations,
13 stories, griping, vouching, evidence, attempts to negate possible
14 defenses, summaries, and the like. McHenry v. Renne, 84 F.3d
15 1172 (9th Cir. 1996) (affirming dismissal of § 1983 complaint for
16 violation of Rule 8 after warning); see Crawford-El v. Britton,
17 523 U.S. 574, 597 (1998) (reiterating that "firm application of
18 the Federal Rules of Civil Procedure is fully warranted" in
19 prisoner cases). It is sufficient, for example, for a prisoner
20 who claims the conditions of his imprisonment violate the Eighth
21 Amendment prohibition against cruel and unusual punishment to
22 allege that an identified state actor used force against
23 plaintiff maliciously and sadistically for the very purpose of
24 causing harm. See Farmer v. Brennan, 511 U.S. 825, 834 (1994).
25 (On the other hand, prison officers imposing discipline act in
26 haste, under pressure and without the luxury of a second chance;

1 therefore, no Eighth Amendment violation occurs where force is
2 applied to maintain or restore discipline but not maliciously and
3 sadistically.)

4 The court (and defendant) should be able to read and
5 understand plaintiff's pleading within minutes. McHenry, supra.
6 A long, rambling pleading including many defendants with
7 unexplained, tenuous or implausible connection to the alleged
8 constitutional injury, or joining a series of unrelated claims
9 against many defendants, very likely will result in delaying the
10 review required by 28 U.S.C. § 1915 and an order dismissing
11 plaintiff's action pursuant to Fed. R. Civ. P. 41 for violation
12 of these instructions.

13 If plaintiff's pleading is deficient on account of an
14 omission or technical defect, the court will not dismiss it
15 without first identifying the problem and giving plaintiff an
16 opportunity to cure it. Noll v. Carlson, 809 F.2d 1446 (9th Cir.
17 1986). Plaintiff's pleading will be construed "liberally" to
18 determine if plaintiff has a claim but it will be dismissed if
19 plaintiff violates the federal rules, once explained, or the
20 court's plain orders.

21 An amended complaint must be complete in itself without
22 reference to any prior pleading. Local Rule 15-220; see Loux v.
23 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an
24 amended complaint, the original pleading is superseded.

25 Plaintiff is admonished that by signing a first amended
26 complaint he certifies he has made reasonable inquiry and has

1 evidentiary support for his allegations and that for violation of
2 this rule the court may impose sanctions sufficient to deter
3 repetition by plaintiff or others. Fed. R. Civ. P. 11. Prison
4 rules require plaintiff to obey all laws, including this one, and
5 plaintiff may be punished by prison authorities for violation of
6 the court's rules and orders. See 15 Cal. Admin. Code § 3005.

7 Title 42 of the United States Code § 1997e(a) provides that
8 a prisoner may bring no § 1983 action until he has exhausted such
9 administrative remedies as are available to him. The requirement
10 is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001). A
11 California prisoner or parolee may appeal "any departmental
12 decision, action, condition, or policy which they can demonstrate
13 as having an adverse effect upon their welfare." 15 California
14 Administrative Code § 3084.1, et seq. An appeal must be
15 presented on a CDC form 602 that asks simply that the prisoner
16 "describe the problem" and "action requested." Therefore, this
17 court ordinarily will review only claims against prison officials
18 within the scope of the problem reported in a CDC form 602 or an
19 interview or claims that were or should have been uncovered in
20 the review promised by the department. Plaintiff further is
21 admonished that by signing an amended complaint he certifies his
22 claims are warranted by existing law, including the law that he
23 exhaust administrative remedies, and that for violation of this
24 rule plaintiff risks dismissal of his entire action, including
25 his claims against defendants R. L. Andreasen, Tom Donahue, John
26 J. Dan, and J. W. Moore.

1 Accordingly, the court hereby orders that:

2 1. Plaintiff's request to proceed in forma pauperis is
3 granted.

4 2. Plaintiff is obligated to pay the statutory filing fee
5 of \$150 for this action. The fee shall be collected and paid in
6 accordance with the notice to the Director of the California
7 Department of Corrections filed concurrently herewith.

8 3. Claims against defendants Cal A. Terhune, Tom Carey and
9 the Department of Corrections are dismissed with leave to amend.
10 Within 45 days of service of this order, plaintiff may amend his
11 complaint to attempt to state cognizable claims against these
12 defendants. Plaintiff is not obliged to amend his complaint and
13 if he does it inevitably will delay this litigation.

14 4. The pleading states cognizable claims against defendants
15 R. L. Andreasen, Tom Donahue, John J. Dan, and J. W. Moore. With
16 this order the Clerk of the Court shall provide to plaintiff a
17 blank summons, a copy of the pleading filed January 5, 2004, four
18 USM-285 forms and instructions for service of process on
19 defendants R. L. Andreasen, Tom Donahue, John J. Dan, and J. W.
20 Moore. Within 15 days of service of this order plaintiff may
21 return the attached Notice of Submission of Documents with the
22 completed summons, the completed USM-285 forms, and five copies
23 of the January 5, 2004, complaint. The court will transmit them
24 to the United States Marshal for service of process pursuant to
25 Fed. R. Civ. P. 4. Defendants R. L. Andreasen, Tom Donahue, John
26 J. Dan, and J. W. Moore will be required to respond to

1 plaintiff's allegations within the deadlines stated in Fed. R.
2 Civ. P. 12(a)(1). In this event, the court will construe
3 plaintiff's election to proceed forthwith as consent to an order
4 dismissing his defective claims against defendants Cal A.
5 Terhune, Tom Carey and the California Department of Corrections
6 without prejudice.

7 Dated: April 26, 2005.

8 /s/ Peter A. Nowinski

9 PETER A. NOWINSKI

10 Magistrate Judge
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United States District Court
Eastern District of California

Dennis Martel,

Plaintiff,

No. Civ. S 04-0014 DFL PAN P

vs.

Notice of Submission of Documents

California Department
of Corrections, et al.,

Defendants.

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Plaintiff hereby submits the following documents in
compliance with the court's order filed _____:

1 completed summons form

4 completed forms USM-285

5 copies of the January 5, 2004
Complaint

Dated: _____

Plaintiff